Supreme Court, U.S.
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No. 02-1066

IN THE

Supreme Court of the United States

KUEHNE & NAGLE, INC.,

Petitioner,

v.

MOTOROLA, INC. and
FIREMAN'S FUND INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is awarding prejudgment interest appropriate in a case governed by Article 22 of the Warsaw Convention?

(2) Should this Court review an affirmance of a factual finding that damage to a portion of the shipment rendered the entire shipment inoperable so as to require the total weight of the shipment to be used in calculating the carrier's limit of liability under Article 22(2) of the Warsaw Convention?

RULE 29.6 STATEMENT

Respondent, Fireman's Fund Insurance Company, is wholly owned by Allianz Aktiensgesellschaft Holding (known as Allianz AG), a publicly traded German corporation. Respondent, Motorola, Inc., a publicly traded United States corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, *reprinted in* S. Exec. R. No. 105-120 (1998) . . . 1, 3, 7

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, September 28, 1955, 478 U.N.T.S. 372 (the "Hague Protocol"), *reprinted in* Sorkin, Goods in Transit, Volume VII 3

Warsaw Convention (for the Unification of Certain Rules Relating to International Transportation by Air) October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* note following 48 U.S.C. § 40105 (1995) 3

INTRODUCTION

Neither of the issues presented warrants review by this Court. Regarding the prejudgment interest issue, not every split in the circuit court decisions requires review. In the case of prejudgment interest, the Warsaw Convention's severe limitations on the principle amount of any recovery make the amount of prejudgment interest awarded relatively small. Because the dollar amounts involved are not significant, this issue does not possess such overwhelming importance to warrant use of this Court's limited resources for review.

With respect to the affected weight issue, none of the usual reasons for review are present. Rather, a factual finding by the district court lies at the heart of the issue: When does damage to one part of a shipment affect the value of the entire shipment? There is no conflict in the circuits on application of the legal principle involved. Further, the Senate ratified Montreal Protocol No. 4 (MP4) after the date of this transaction, mandating application of the 1955 Hague Protocol affected weight standard to Warsaw cargo shipments henceforth in any event. Petitioner thus fails to raise any legal issues that support review of the affirmance of the district court's factual finding that the damage, which rendered the entire system inoperable, affected the value of the shipment.

REASONS FOR DENYING THE WRIT

A. The Prejudgment Interest Issue Is Not Substantial and Was Correctly Decided.

1. The Question of Awarding Prejudgment Interest in a Warsaw Limitation Case Does Not Possess Sufficient Importance to Warrant Review.

The overwhelming majority of Warsaw cases settle and never reach the trial stage. Of those few that do go to trial, even fewer reach the appellate courts. While the few appellate courts that have considered the issue have come to differing conclusions, as set forth in petitioner's writ, that does not automatically require review by this Court. Quite simply, in terms of dollar amounts, the issue of awarding prejudgment interest in a Warsaw limitation case is not of overwhelming importance to warrant review.

In Warsaw cases involving damage to cargo, the Convention's limitation provision provides for low damage awards. *See Transworld Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (carrier's liability for $250,000 shipment limited to $6,475); *Republic National Bank v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987) (carrier's liability for $2 million dollar shipment limited to $634); *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*, 737 F.2d 456 (5th Cir. 1984) (carrier's liability limited to $16,870) *Federal Ins. Co. v. Air Express Int'l Corp.*, 1994 WL 176967 (S.D.N.Y. 1994) (carrier liability limited to $352); *Tokio Marine v. United Airlines Inc.*, 933 F. Supp. 1527 (C.D. Cal. 1996) (carrier's liability limited to $7,700). Even in those few cases where the damage affects the value of the entire shipment, as in this case, the Convention severely limits

recoveries. *See Deere & Co. v. Lufthansa*, 855 F.2d 385 (7th Cir. 1988) (involving a principal award of $115,957 in which the district court awarded prejudgment interest in the amount of $45,000). Because of such low damage awards, prejudgment interest awards are thus correspondingly small. In this case, the prejudgment interest amounted to only about $41,000.

Similarly, in cases involving wrongful death, the dollar amounts involved are not significant. In cases subject to the unamended Warsaw Convention, damages are limited to a maximum of $75,000. *See O'Rourke v. Eastern Airlines*, 730 F.2d 842 (2d Cir. 1984); Article 22 of the Warsaw Convention (for the Unification of Certain Rules Relating to International Transportation by Air) Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* note following 48 U.S.C. § 40105 (1995). In cases subject to The Hague Protocol 1955, which went into force in the United States pursuant to the United States' ratification of MP4 and which increases recoverable damages, the maximum limit merely doubles. *See* Article 22(a) of the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, September 28, 1955, 478 U.N.T.S. 371 (the "Hague Protocol"), *reprinted in* Sorkin, Goods in Transit, Volume VII. In either instance, any award of prejudgment interest would still be quite small.

Given the fact that very few Warsaw cases complete the trial phase and the fact that the monetary amounts involved are relatively small, the question of awarding prejudgment interest in Warsaw limitation cases does not possess sufficient importance for this Court to devote its limited and valuable resources to reviewing. Compelling reasons for review therefore do not exist.

2. Failing to Awarding Prejudgment Interest in a Warsaw Case Allows an Air Carrier to Pay Less than the Limit Mandated by Warsaw.

Petitioner incorrectly frames the issue in terms of an award *in excess* of Warsaw limits. In fact, failing to award prejudgment interest results in an award of *less* than Warsaw limits. An air carrier knows the weight of the shipment from the moment the carrier issues its air way bill and charges freight. At that point, its maximum exposure is ascertainable to the penny. As recognized by the trial court and the Ninth Circuit in this case, failing to award interest on that sum *reduces* the air carrier's liability below Warsaw limits. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), pages 15a-27a of Appendix A to Petitioner's Petition.

This principle was succinctly explained by the court in *Eli Lilly Argentina v. Aereolinas Argentinas*:

> [T]he purpose of the Convention — 'to fix at a definite level the cost to airlines of damages' (cit.om.). is served rather than thwarted by awarding interest. The airline's liability is known upon the date of the loss; interest is earned by the airline on that amount until the date of judgment. *Were prejudgment interest disallowed, the money paid would, in essence, be less than the limitation imposed by the Convention. It would be the present value of a future payment, a discounted amount.* And the limitation would not be uniformly fixed worldwide because it would vary according to the degree of congestion in each forum's courts, procedural delays, and the tactics of the parties.

508 N.Y.S.2d 865, 867 (Civ. Ct. New York, 1986) (*emphasis added*).

The principle is easily illustrated: Upon the occurrence of a loss, the air carrier could either pay the loss as limited by Warsaw or deposit the same sum into an interest-bearing account. If the sum is deposited into the account, at the conclusion of the litigation, if the plaintiff is successful, the plaintiff is entitled to the amount in the account. Without interest, the limitation amount is less than the limit required by Warsaw.

B. There Is No Basis for Reviewing the Ninth Circuit's Affirmance of the Trial Court's Calculation of Damages.

1. The Calculation of Damages Was a Factual Finding.

The Ninth Circuit correctly noted that the parties had agreed in the joint final pretrial order that the Warsaw limitation applicable to the shipment would be calculated according to the weight of the entire shipment — and not just that of the damaged portion — if Motorola proved at trial that the damage to the shipment rendered the entire system inoperable and caused the construction of operation of the system to be delayed for a period of several weeks. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), page 4a of Appendix A to Petitioner's Petition. After a trial at which petitioner *no evidence* to rebut Motorola's evidence, the trial court found that the entire cellular base system could not function at all without the damaged control frame because it was the "heart and soul" of the overall system. The trial court determined that a legitimate and reasonable inference could be drawn that the actual assembly of the entire system was delayed by the length of time it took to replace the control frame — six weeks. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), page 12a-13a of Appendix A to Petitioner's Petition.

Having agreed to the method of calculating damages at trial, Petitioner nonetheless made the same baseless "no evidence" argument in the Ninth Circuit that it raises here. The Ninth Circuit rejected it:

> The district court did not clearly err in relying on Koepke's expert testimony and finding that the damage to the control frame affected the value and operation of the entire base station. Accordingly, the court properly determined that the liability limitation here must be based on the weight of the entire cellular base station, not only on that of the damaged control frame.

Motorola Inc. v. Federal Express Corp., 308 F.3d 995 (9th Cir. 2002), page 13a of Appendix A to Petitioner's Petition.

The claim that no evidence was introduced was a misstatement to the Ninth Circuit and is a misstatement here. It provides no basis for granting the petition.

2. Petitioner Has Failed to Raise any Legal Issue Supporting Review of the Calculation of Damages.

Petitioner has not pointed to any conflict in the circuits regarding the affected weight standard applied by the trial court and the Ninth Circuit in calculating Motorola's damages based on the weight of the entire cellular base station. Indeed, the Ninth Circuit noted that federal courts considering the issue in Warsaw cases have uniformly applied the affected weight standard. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), page 9a-12a of Appendix A to Petitioner's Petition. Thus, there is no conflict in the circuits as a basis for review.

Further, as recognized by Petitioner, with the ratification of MP4 in 1999 (well after the shipment at issue) which codifies the Hague Protocol of 1955 affected weight standard, *see* Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on Sept. 8, 1955, r*eprinted in* S. Exec. R. No. 105-120 (1998), there is no longer any doubt that the standard must be applied to the calculation of damages in all Warsaw cases where the entire shipment is affected by loss or damage to a portion of it. There is no showing that the lower courts have difficulty applying the standard. Indeed, it appears from the reported cases that the application has been uniform.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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